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No. 96-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

This *amicus curiae* brief is submitted, with the written consent of all parties, on behalf of the Aerospace Industries Association of America, Inc. ("AIA").[1] The parties' letters consenting to the filing of this brief have been filed in the office of the Clerk.

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[1] This brief was authored by counsel for AIA. No "person or entity, other than the *amicus curiae* [or] its members, . . . made a monetary contribution to [its] preparation or submission." Sup. Ct. R. 37.6.

INTEREST OF *AMICUS CURIAE*

AIA is the national, non-profit trade association representing manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment. AIA is comprised of fifty-five member companies, including many of the nation's largest corporations.

AIA member corporations are no strangers to complex, multiparty, multidistrict litigation of the type Congress had in mind when it enacted 28 U.S.C. § 1407. For example, AIA member corporations are frequently parties to the aviation accident cases consolidated for pretrial proceedings by the MDL Panel. Air crash cases "present a prime example of the need which gave rise to enactment of Section 1407." *In re Air Crash Disaster Near Chicago*, 476 F. Supp. 445, 447 (J.P.M.L. 1979). The enormous costs of such litigation would be multiplied manyfold if this Court, repudiating thirty years of practical experience, holds that a § 1407 transferee court conducting pretrial proceedings lacks the authority to transfer for trial pursuant to 28 U.S.C. § 1404(a).

A primary reason why *amicus* is submitting this brief is to highlight the differences between this case and the vast majority of multidistrict cases that would be impacted by a holding that a § 1407 transferee court lacks the power to order a § 1404(a) transfer. Whether in this particular case the § 1407(a) transfer by the MDL Panel and § 1404(a) transfer by the transferee court made sense, or were an appropriate exercise of the various tribunals' transfer powers, are very different questions from whether, in general, the § 1407 transferee court has the power to order

a § 1404(a) transfer as part of the "pretrial proceedings" in a case. To the extent the Court may share Petitioner's belief that this case was not factually appropriate for the § 1407(a) or § 1404(a) transfers, *amicus* submits that the solution is not to discard thirty years of positive experience and prohibit all § 1404(a) transfers by a § 1407 transferee court.

SUMMARY OF ARGUMENT

1. The atypical factual and procedural posture of this case, as compared to the cases usually subject to transfer under § 1407(a) and § 1404(a), make it an inappropriate vehicle in which to address a critical substantive issue of relevance to all multidistrict litigation. The Court should not reach the issue of whether a § 1407 transferee judge conducting "pretrial proceedings" may rule on a § 1404(a) transfer motion if, as AIA believes, there are narrower grounds upon which to decide this particular case.

2. If the Court does reach the substantive issue, compelling reasons of fairness, efficiency, and economy support an interpretation that upholds the time-tested use of § 1404(a) transfer powers by the § 1407 transferee court. The rationale for a § 1407 "pretrial proceedings" transfer applies with at least equal force to a § 1404(a) transfer for trial. The unique facts of Petitioners' case do not highlight the advantages of a subsequent § 1404(a) transfer, but in the majority of multiparty, multidistrict settings these benefits are of great significance. The Court should not lightly conclude that the statutory scheme deprives the judicial system of these important benefits.

ARGUMENT

I. THE COURT SHOULD DISMISS THE WRIT OR AFFIRM THE DECISION BELOW WITHOUT DECIDING THE POWERS OF A § 1407(a) TRANSFEREE COURT.

A. Lexecon Did Not Pursue The Remedies Available To It In This Atypical MDL Litigation.

At the outset, *amicus* submits that this may be just too atypical a case to use as the vehicle to decide the future course of MDL litigation. This "tag-along" defamation action is about as far removed from the typical MDL case as one can get. An example of a more typical MDL context, the air crash disaster, has already been mentioned. The Court is well aware of other familiar MDL contexts: environmental, labor/discrimination, securities, antitrust, trademark and copyright, patent infringement and validity, mass tort, etc. *See* David F. Herr, MULTIDISTRICT LITIGATION ¶ 5.4.2 (1986 & Supp. 1996) (citing examples in each category). Recognizing that every case may be important to the immediate parties, it is nevertheless fair to say that Lexecon's desire for a new venue to pursue a single surviving defamation claim provides a poor framework for considering the important issues of multidistrict litigation. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (writ dismissed as improvidently granted even when question presented "would seem to be of great practical importance to these litigants").

Petitioner attempts to "color" its presentation of the legal issue with a strong undertone that both the original § 1407(a) transfer and the subsequent § 1404(a) transfer

were unjustified by the facts. *See, e.g.*, Pet. Br. at 7 (arguing that the § 1407 transferee judge had no familiarity with underlying litigation, no coordinated pretrial proceedings took place, document depository was never used, etc.). *Amicus* does not concede that any case-specific injustice occurred; if it did, however, the remedy sought—preventing § 1407 transferee judges from ever ordering another § 1404(a) transfer—goes far beyond what is necessary to eliminate the alleged injustice. There were remedies available to Petitioner when faced with transfer orders with which it did not agree. A decision by the MDL Panel to transfer a case under § 1407(a) is reviewable under 28 U.S.C. § 1651, the All Writs Act. *See* 28 U.S.C. § 1407(e); *In re Regents of Univ. of Cal.*, 964 F.2d 1128, 1136 (Fed. Cir. 1992); *In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990). Lexecon never sought such review. Similarly, a § 1404(a) transfer order can be attacked for abuse of discretion. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

One other procedural lapse by Lexecon is significant. Lexecon complains that this case should have been remanded for trial, but it never sought remand from the sole authority empowered to grant such a request—the MDL Panel itself. Lexecon cannot escape the language of § 1407(a): "'[e]ach action so transferred shall be remanded *by the panel* at or before the conclusion of such pretrial proceedings . . . .'" Pet. Br. at 3 (quoting § 1407(a)) (emphasis shifted). Having ignored its dereliction entirely, Lexecon's brief gives the Court no reason to excuse it.

At this point, because of its own tactical decisions, Petitioner is left to argue that the § 1407 transferee court

was utterly without power to order a § 1404(a) transfer. This Court should not undo thirty years of settled law in order to remedy any perceived injustice to this oddly situated litigation. As Justice Thomas warned in his dissent in *Doggett v. United States*, 505 U.S. 647, 659 (1992): "Just as 'bad facts make bad law,' so too odd facts make odd law."

The interests of the litigants in countless present and future cases having enormous financial consequences would be adversely affected if this Court were to rule that a § 1404(a) transfer is somehow uniquely beyond the scope of "pretrial proceedings." This is the wrong case in which even to consider making such a holding.

B. Because Of The Factual And Procedural Oddities, The Result Below Can And Should Be Affirmed Outside The Merits.

Petitioner's failures properly to seek below the relief now requested enable the Court to resolve this atypical case on narrow grounds. Any argument made below that supports the lower court's judgment, "whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," may be presented to this Court as a basis for affirming the result below. *E.g.*, *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted."). The question purportedly presented by this case is not squarely before the Court because Lexecon did not request remand from the MDL Panel prior to trial and then

seek review, pursuant to 28 U.S.C. § 1651, of any denial. Accordingly, this Court may affirm the decision below on this basis.

Having failed to request remand from the only body that could have entered such an order, Lexecon played its hand at trial and now wishes to try again in another venue. Preventing two bites at the apple is a primary reason for the harmless error statute, 28 U.S.C. § 2111, which would appear to apply squarely here. *See United States v. Lane*, 474 U.S. 438, 444 (1986) (harmless error statute allows Court to ignore errors or defects which do not affect the substantial rights of the parties).

Alternatively, dismissing Petitioner's writ of certiorari as improvidently granted would recognize that the Court's certiorari jurisdiction should be used sparingly to decide questions of true importance. *See, e.g.*, *Jones v. State Bd. of Educ.*, 397 U.S. 31, 32 (1970) (emergence after oral argument of fact not previously obvious in record "render[s] the case an inappropriate vehicle for this Court's first decision" in a particular subject area; writ dismissed); *Needelman v. United States*, 362 U.S. 600, 600 (1960) ("record does not adequately present the questions tendered in the petition"; writ dismissed).

II. IF THE MERITS ARE REACHED, THE COURT'S DECISION SHOULD PRESERVE THE BENEFITS DERIVED WHEN A § 1404(a) TRANSFER FOLLOWS A § 1407(a) TRANSFER.

If the Court does reach the merits of this case, the decision below should be affirmed. Respondents' brief discusses the compelling statutory justification for the

procedures that have worked so well for almost thirty years. Accordingly, *amicus* offers only a summary rebuttal of Petitioner's statutory argument.

A § 1407 transferee judge is authorized to conduct "pretrial proceedings," which include the resolution of a § 1404(a) transfer motion. The statutory language, the applicable legislative histories, and the historical background relating to Congress' efforts to deal efficiently and fairly with multiparty, multidistrict litigation all support this reading and the Ninth Circuit's decision below.

To affirm the decision below on the merits, it is sufficient to hold that federal law permits a § 1407 transferee judge to rule on a § 1404(a) transfer motion, like any other pretrial motion, as part of the conduct of "pretrial proceedings." This straightforward holding will preserve the simplifications, efficiencies, and economies that courts and litigants have rightly come to expect from the interplay of § 1407 and § 1404(a).

If, as Judge Kozinski (the dissenter below in this case) has written in another case, appellate judges crafting rules in the *absence* of statutory imperative are to "select the rule of law that advances fairness while diminishing the risk and cost of litigation," appellate judges (and justices) reviewing procedures *entirely consistent with* the law should be cognizant of those same concerns—even more so where the procedures are tried and tested "in the crucible of litigation." *See United States ex rel. Balzer Pac. Equip. Co. v. Fidelity & Deposit Co.*, 895 F.2d 546, 554-55 (9th Cir.

1990) (Kozinski, J., dissenting).[2] There are compelling reasons why a § 1404(a) transfer for trial often follows a § 1407 pretrial consolidation: fairness, judicial economy, and reduced costs are among the most important.

For example, individual plaintiffs' suits arising out of a commercial airplane accident are typically filed in various jurisdictions across the country. For defendants in such cases, and for the federal judicial system, the "burdens of multiple lawsuits," *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983), are severe. Effective coordination of such cases requires use of all available statutory tools. *See id.*

Aircrash cases originating in or removed to the federal court system are commonly consolidated by the MDL Panel in the jurisdiction nearest the "situs of the crash." *In re Air Crash Disaster at Chattanooga*, 393 F. Supp. 1406, 1407 (J.P.M.L. 1975); *In re Air Crash Disaster Near Upperville*, 393 F. Supp. 1089, 1090 (J.P.M.L. 1975); *In re Air Crash Disaster at Florida Everglades*, 360 F. Supp. 1394, 1395 (J.P.M.L. 1973); *In re Air Crash Disaster at Huntington*, 342 F. Supp. 1400, 1403 (J.P.M.L. 1972). The reason is obvious—important witnesses, documents, and physical evidence are all likely to be found near the crash site; therefore, discovery can most effectively and expeditiously

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[2] "[I]mpractical appellate opinions" that are not mindful of the "realities of litigation" and which "unnecessarily complicate the litigation process" are, Judge Kozinski wrote, "like the proverbial crocodile in the bathtub: You can't ignore them and they immensely complicate the task at hand." *United States ex rel. Balzer Pac. Equip. Co.*, 895 F.2d at 554.

be supervised in the district nearest that site. *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 407 F. Supp. 244, 246 (J.P.M.L. 1976); *In re Air Crash Disaster Near Upperville*, 393 F. Supp. at 1090; *In re Air Crash Disaster at Charlotte*, 393 F. Supp. 1404, 1406 (J.P.M.L. 1975).

A typical transfer order from the MDL Panel underscores the benefits. In ordering transfer of cases arising out of an aircraft accident near Colorado Springs, Colorado, the Panel found that

> the actions in this litigation involve common questions of fact and that centralization . . . in the District of Colorado will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. . . . Centralization under Section 1407 is desirable in order to avoid duplication of discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary.

In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991, MDL No. 1022, slip op. at 1 (J.P.M.L. Oct. 13, 1994).

A subsequent 1404(a) transfer for trial advances and increases these benefits. Such a transfer is not, of course, automatic following a § 1407 consolidation, in air crash litigation or any other context. *See, e.g., In re Am. Fin. Corp. Litig.*, 434 F. Supp. 1232, 1234 (J.P.M.L. 1977)

("[P]rior denial of a [§] 1404(a) transfer is not dispositive of a [§] 1407 motion because of the different considerations that underlie these two statutes."). Unless the proposed transferee court has subject matter jurisdiction and personal jurisdiction over the parties and venue is proper, transfer under § 1404(a) is not an option. Thus, in the Colorado Springs aircrash cases previously referenced, the § 1407 transferee court deciding a subsequent § 1404(a) transfer motion first found that it had jurisdiction and that venue was uncontested (and proper). *In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991 (MDL-1022)*, C.A. No. 94 N 9102, slip op. at 17-18 (D. Colo. Jan. 30, 1997).

Where jurisdiction and venue lie, the Court must also consider the convenience of the parties and the interests of justice before finalizing any § 1404(a) transfer. *See* 17 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 111.12[1], at 111-53 to -60 (3d ed. 1997). Not surprisingly, balancing the convenience factors often means that § 1404(a) transfers for trial follow § 1407(a) transfers in major multidistrict cases. *See generally* 8 James Wm. Moore, MOORE'S FEDERAL PRACTICE ¶ 42.11[2][c], at 42-24 to -25 (3d ed. 1997) (In mass tort litigation, "the logical next step [after a § 1407(a) transfer is] a transfer for consolidation and trial under [§] 1404(a)."); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, THIRD at 254 (1995). The benefits of convenience, diminished risk of inconsistent adjudications, and reduced costs are frequently compelling in such litigation.

For example, the court in the Colorado Springs cases ruled that "the similarity of the parties and issues in all of the cases transferred to this court for pretrial purposes leads

me to conclude that transfer to this court for trial is warranted," even though such a transfer "would deprive [plaintiffs] of [their] choice of forum and inconvenience some parties and witnesses." *In re Air Crash Near Colorado Springs, Colo., on Mar. 3, 1991 (MDL-1022)*, C.A. No. 94 N 9102, slip op. at 20. The court found that "[n]o other district is better situated to address the concerns of convenience of parties and witnesses and the interests of justice," particularly where "[t]ransfer to this court would provide a single forum for determining the issues in this litigation." *Id.* at 19, 20; *see also In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 391 (E.D. Mich. 1989) (Consolidating "all [156] pending cases for a joint trial on all liability issues."); *In re Air Crash Disaster at Sioux City, Iowa*, No. 89 C 8082 (MDL No. 817), 1991 U.S. Dist. LEXIS 10964, at *3 (N.D. Ill. July 29, 1991) (Consolidating all pending cases "for trial on liability and punitive damages.").

Describing this sort of disposition as a "power grab," App. at 57, is rather unsubtle advocacy. The § 1407/ § 1404(a) combination is, in fact, a sensible use of the statutory authority granted to the district courts by Congress, all in an effort to streamline and manage large cases, avoid inconsistent results, and conserve the resources of all involved. As the current Chief Judge of the MDL Panel has observed, "the major advantage arising from cases being centralized under the MDL is the fact that, as a practical matter, most cases are disposed of by the transferee court under [§] 1404 . . . , by settlement or by other final disposition." *Judge John F. Nangle: Complex, Related Cases Benefit from Centralization*, THE THIRD BRANCH 10 (Dec. 1995).

This Court, if it reaches the merits, should not destroy this advantage on the strength of Petitioner's myopic arguments.

CONCLUSION

As argued by Respondents, and supported by the foregoing additional reasons, the writ should be dismissed as improvidently granted, or the judgment of the Ninth Circuit below should be affirmed.

Respectfully submitted,

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